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IN THE
Supreme Court of the United States

VICTORIA BRADSHAW, *et al.*,
Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondent's counsel has not responded to a request for consent. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 67 national and international unions with a total membership of approximately 13 million working men and women. Many of these workers are employed on public work projects, are protected by laws, like the California law at issue in this case, that

require contractors and subcontractors to pay prevailing wages, and have a vital interest in assuring that the prevailing wages are paid. That being so, the AFL-CIO's affiliate, the State Building and Construction Trades Council of California, AFL-CIO, participated as an *amicus curiae* in the court below.

2. In California, as in many other jurisdictions, the contractor/subcontractor obligation to pay prevailing wages is a material term of public works contracts and subcontracts. The decision below invalidated on procedural due process grounds a statutory scheme pursuant to which the State withheld contract payments from its contractors because of contractor/subcontractor noncompliance with the contractual obligation to pay prevailing wages. Public owner withholding of payment to contractors is the standard method of ensuring compliance with prevailing wage requirements, just as it is the standard method by which public and private owners ensure that their contractors comply with other material stipulations in a contract.

3. In the accompanying *amicus curiae* brief, we show that the respondent was *not* deprived of a property interest by the withholding of contract payments here. This Court made clear in *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), that a claimant has no property interest in the immediate payment of money until the claimant's entitlement to that payment has been established under state law. In this case, respondent has not established that it complied with the prevailing wage requirement, and such compliance was a condition precedent to the respondent's entitlement to the withheld contract payments. We also show that the theory upon which the decision below ultimately rested—that the respondent has been deprived of a property interest in its *claim* for payment—is no more tenable. This is not a case like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in which the State has "destroyed" a legal claim. Here California law provide the respondent the legal means to pursue its claim for the withheld contract payment, which the respondent chose not to pursue.

CONCLUSION

For the foregoing reasons, this motion to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), files this brief *amicus curiae* contingent on the granting of the forgoing AFL-CIO motion for leave to file said brief.[1]

STATEMENT

1. The Statutory Scheme.

At the *federal* level, the Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. § 276a, provides that contractors and subcontractors on federal public works projects must pay their employees at least the same wages paid in the project's locality on similar, private construction projects. Many states, California among them, have followed the same course by providing that all contractors and subcontractors on *state and local* public works projects must pay their employees "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed." Cal. Labor Code § 1771.

The obligation to pay prevailing wages is a material term of California public works contracts. When a public agency awards such a contract to a general contractor, the agency must "cause to be inserted in the contract a stipulation" that the general contractor will ensure that all employees on the project are paid prevailing wages. Cal. Labor Code § 1775. State law further requires the awarding body to specify "in the call for bids for the contract, and in the bid specifications

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

and in the contract itself" the applicable prevailing wage rates (or provide notice that the wage rates are available upon request) and to post those rates at the job site. *Id.* § 1773.2. Public works contracts must also include a stipulation by the general contractor that, if prevailing wages are *not* paid to all employees on the project, the general contractor will be liable to the awarding body for back wages and penalties. *Id.* § 1775.

The California prevailing wage law contemplates that a general contractor on a public work project may, as is typical in the construction industry, retain subcontractors to carry out various aspects of the contracted-for work. The California Labor Code provides that "[w]orkers employed by contractors or *subcontractors* in the execution of any contract for public work are deemed to be employed upon public work," § 1772 (emphasis added), and, accordingly, requires that both "[t]he contractor to whom the contract is awarded, and any *subcontractor* under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract," § 1774 (emphasis added).

That being so, the California law includes several provisions designed to insure that subcontractors on public work projects pay their employees the prevailing wage. The law requires that "[t]he contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of [the prevailing wage statute]." Cal. Labor Code § 1775(b)(1). The law also requires that "[e]ach contractor and subcontractor shall keep accurate payroll records" for "each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work," and that "[a] certified copy of [these] payroll records . . . shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of

Apprenticeship Standards of the Department of Industrial Relations." *Id.* § 1776 (a). And, the law provides that "[t]he contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor." *Id.* § 1775(b)(2).

Once the project begins, the awarding body must "take cognizance of violations of" the prevailing wage law, Cal. Labor Code § 1726, and "[b]efore making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract," *id.* § 1727. Where payments have been "withheld from [the general contractor] by the awarding body on account of the subcontractor's failure to comply with the [prevailing wage requirements]," the contractor is given permission to "withhold from [the] subcontractor . . . sufficient sums to cover [the amount so withheld]." *Id.* § 1729. In other words, payment of the prevailing wage by the general contractor and the subcontractor is a condition precedent to the general contractor's or the subcontractor's entitlement to the full contract price.

If the awarding body withholds from the payments on a public works project an amount covering wages and penalties owed because of the general contractor's or the subcontractor's failure to pay prevailing wages, and the general contractor or subcontractor wishes to challenge that withholding, state law specifies the remedy. "Suit may be brought by the contractor or his or her assignee" against the awarding body for "recovery of the wages and penalties" being withheld. Cal. Labor Code § 1733. Such a "suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages and penalties." *Id.* § 1732. "No other issues shall be presented to the court" in

such a lawsuit, and the suit is "without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract." *Id.* § 1733.

If a lawsuit is filed by a general contractor or subcontractor to recover withheld wages and penalties, the awarding body must retain custody of the amount in dispute until that suit is resolved. Cal. Labor Code § 1731. If no suit is filed, or the lawsuit is unsuccessful, the back wages are distributed to workers, and the penalties are paid to the State. *Id.*

2. The Facts.

Respondent G & G Fire Sprinklers, Inc. (G&G) performed work as a subcontractor on three public works projects in California. Pet. App. 23. On each of those projects, the awarding body withheld payment from the general contractor, pursuant to the prevailing wage stipulation in the contracts, based on G & G's failure to pay the prevailing wage in performing its work on the subcontract. *Id.* The awarding bodies had been directed to withhold these funds by the state's Division of Labor Standards Enforcement (Labor Standards Division or DLSE), which serves as the lead agency for the enforcement of the prevailing wage laws. *Id.*; Cal. Labor Code § 90.5(b). DLSE sent to G & G and to the general contractor a copy of each notice it sent to the awarding body. *See* J.A. 195-222.

After the awarding bodies withheld payments from the general contractors, these general contractors, in turn, withheld the same amounts from their payments to G & G on the subcontracts. Pet. App. 23. California law provides that "[i]t shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with" the prevailing wage law. Cal. Labor Code §1729.

3. The District Court's Ruling.

After the general contractors withheld payment on the subcontracts, G & G brought suit in the United States District Court against the California Labor Standards Division and various State officials under 42 U.S.C. § 1983. J.A. 16. G & G alleged that it had been deprived of property without due process because, as a result of the issuance of notices to withhold by DLSE to the awarding body: i) payments that G & G claimed to be due under its subcontracts had been withheld by the general contractors; and ii) G & G had not been provided with a hearing on whether it had failed to pay the prevailing wage or to contest the amount of the wages and penalties withheld. J.A. 62-78.

G & G did not put into the record the awarding-body/general-contractor contracts or the G & G/general-contractor subcontracts. Nor did G & G make any claim that: i) those contracts did not contain the mandated stipulation requiring the payment of prevailing wages and stating that, if the prevailing wages were not paid, the awarding body was entitled to withhold payments from the general contractor to cover the unpaid portion of wages and penalties; ii) G & G had a right to full contract payment even if G & G had not paid prevailing wages in carrying out the subcontracts; or iii) G & G had taken any action to challenge the withholding of payment on the subcontracts and to secure full payment prior to filing its due process suit in federal court.

The district court granted G & G's motion for summary judgment, striking down California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 as in violation of the Due Process Clause. Pet.App. 86. The district court also enjoined the Labor Standards Division from enforcing those provisions against G & G, and declared the notices to withhold issued by DLSE for the three projects to be invalid. *Id.* The district court did not issue an opinion explaining the basis for its decision.

4. The Ninth Circuit's Rulings.

a. In its first decision in this matter, the Ninth Circuit in a 2-1 panel decision (Circuit Judges Hawkins and Reinhardt in the majority, Circuit Judge Kozinski in dissent) reversed the district court's injunction as overbroad but affirmed the summary judgment below insofar as it held that California had denied G & G due process. Pet. App. 39-41.

The court of appeals concluded that G & G had a "property interest in being paid in full for the construction work it has completed," and that "[t]he state's withholding . . . has deprived G & G of its interest." Pet. App. 30.

Having concluded that "G & G has suffered a deprivation of a protectible property interest as a result of the state's action," the Ninth Circuit turned to consideration of "whether the state accorded G & G due process when it effected this deprivation." Pet. App. 34. The court of appeals held that the Due Process Clause would be satisfied by either a "pre-deprivation" hearing or a reasonably prompt "post-deprivation" hearing, but that California's statutory scheme was deficient because it did not provide either type of hearing to subcontractors. Pet. App. 34-37. And, the majority concluded that, in any event, the availability under state law of a lawsuit to recover the withheld funds would not satisfy the requirements of due process, apparently because such a suit would not provide a sufficiently prompt hearing to remedy the "deprivation" of G & G's "property." Pet. App. 36-37 n.9.

Judge Kozinski dissented, stating that the case presented a "run-of-the-mill" contract dispute and that a contractor is not deprived of "property" for due process purposes simply because the State as party to a contract chose to withhold a contract payment on account of non-compliance with a term of the contract. Pet. App. 49-50. The dissent also disputed the majority's premise that state law provided a subcontractor

like G & G with no remedy at all to recover the sums it claimed to be owed. Pet. App. 50.

b. California petitioned this Court for a writ of *certiorari*. While that petition was pending, this Court issued its decision in *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), rejecting a procedural due process challenge to a state statutory scheme for providing workers' compensation benefits. After the *Sullivan* decision issued, this Court granted the State's *certiorari* petition, vacated the Ninth Circuit's decision, and remanded the case for reconsideration in light of *Sullivan*. *Bradshaw v. G & G Fire Sprinklers, Inc.*, 526 U.S. 1061 (1999).

c. Following the remand, the Ninth Circuit panel (again in a 2-1 decision) issued an order "reinstating [its] judgment and opinion" based on its "determin[ation] that *Sullivan* is fully consistent with our analysis." Pet. App. 3. In this reinstatement order, the court of appeals characterized its earlier opinion as "adopt[ing] the approach explicitly preserved by the *Sullivan* majority and unequivocally adopted in Justice Ginsburg's concurrence," *viz.* that G & G did *not* have a property interest in payment of the disputed funds, but rather had such an interest in its *claim* for payment. Pet. App. 5-6. According to the majority, "G & G's due process rights were violated, . . . not because it was denied immediate payment, but because the California statutory scheme afforded *no hearing at all* when state officials directed that payments be withheld." Pet. App. 6 (emphasis supplied).

Judge Kozinski dissented from the reinstatement order, pointing out, among other things, that

> The majority's current position is that its holding is in line with previous Supreme Court precedent protecting plaintiffs' "property interest in their *claims* for payment." . . . . If the property interest at stake here is G & G's *claim* for payment, however, when and how was G & G deprived of it? . . . . G & G has yet to attempt to

file a claim in state court. [Pet. App. 13 (emphasis in original).]

SUMMARY OF ARGUMENT

The threshold issue in this case is whether provisions of the California prevailing wage law violate the federal Constitution by depriving respondent G & G Fire Sprinklers, Inc. of property without due process. The first inquiry under this Court's precedents is whether G & G has been deprived of any "property." G & G's due process claim fails this first inquiry and the court below erred in concluding otherwise.

G & G claims to have been deprived of a property interest because i) the State withheld payment from its general contractors on public works projects on account of the failure of G & G, a subcontractor, to make required prevailing wage payments, and ii) those general contractors, in turn, withheld the same amounts from G & G.

When this case was first before the Ninth Circuit—prior to this Court's decision in *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40 (1999)—the Ninth Circuit, in a 2-1 panel decision, concluded that G & G had a property interest in the immediate payment of the amounts "to which it claims it is entitled" for performing work on the subcontracts. The *Sullivan* decision renders that conclusion untenable.

The contracts and subcontracts for the public works projects made G & G's compliance with the prevailing wage law a condition precedent to G & G's entitlement to contract payments. The awarding body, and apparently the general contractor, disputed that G & G had satisfied this contractual obligation. *Sullivan* makes clear that there is no property interest in the immediate payment of amounts claimed to be due until the claimant has cleared the hurdles necessary for its entitlement to payment to attach under state law. In this case, G & G has not yet cleared that hurdle by showing that it met the contractual requirement to pay prevailing wages.

After this Court vacated the Ninth Circuit's first decision here and remanded this case for reconsideration in light of *Sullivan*, the court of appeal shifted the locus of G & G's property interest. The court below correctly acknowledged that, under *Sullivan*, G & G had no property interest in the immediate payment of the disputed amounts to which G & G claimed entitlement. The court of appeals concluded instead that G & G had a property interest in its *claim* for payment of those amounts, and that the State had destroyed *that* property interest by denying G & G any opportunity to present its claim of entitlement to the withheld contract payments. California law is to the contrary. The prevailing wage law provides expressly for a suit "by the contractor or his or her assignee . . . to establish his or her right to" the amounts withheld. Cal. Labor Code § 1733. G & G could have secured assignments from its general contractors and pursued such suits. So far as the record shows, G & G did not do so and has offered no explanation for its failure.

The Ninth Circuit focused not on the case before it but on the purely hypothetical scenario of a subcontractor that requests and is unable to obtain an assignment from a general contractor and therefore, in the court of appeals' view, is left holding "an empty bag." Under California law, however, this hypothetical subcontractor would have perfectly adequate legal and equitable means to bring its claim for the withheld contract payments. The point here is that G & G—which had ample opportunity to make its claims under state law—did absolutely nothing to make, much less perfect, those claims.

On the foregoing analysis, the question whether the decision of the general contractor to withhold payment from G & G constitutes "state action" is no longer in the case. The only plausible post-*Sullivan* procedural due process argument is that the State has destroyed G & G's *claim* to the withheld contract payments. That argument fails not because of the absence of state action but because the State did not, in fact, destroy G & G's claim.

ARGUMENT

In this case, "G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its federal due process rights." Pet. App. 32.

The California statutory provisions in question, which are "incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law." Pet. App. 32. The events precipitating this due process challenge to the State's prevailing wage law occurred when: i) the State withheld a portion of the payments otherwise due to general contractors on various public work projects on the ground that G & G, a subcontractor, had not paid its employees on the projects at the prevailing wage rates; and ii) the general contractors, in turn, withheld a corresponding portion of the amounts otherwise due to G & G under the subcontracts.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Accordingly, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Manufacturers Insurance Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

As we now show, G & G's due process claim fails this "first inquiry" and the court below erred in concluding to the contrary.

A. The Ninth Circuit's first—pre-*Sullivan*—due process ruling in this case cannot be squared with this Court's due process analysis in *Sullivan*.

In its first decision, the court of appeals identified G & G's property interest as follows: "G & G's interest arises from its

public works contract; it has a property interest in being paid in full for the construction work it has completed." Pet. App. 30. Having so framed the issue, the Ninth Circuit concluded that "[t]he state's withholding of [the disputed portion of the amount otherwise due under the contract] has deprived G & G of its interest in full payment for services rendered." Pet. App. 30.

In other words, the "property interest" identified by the first Ninth Circuit decision here was G & G's interest in receiving immediate payment of the full amount "it claims it is entitled" to under the subcontracts, even though it is the position of the State—and, apparently of the general contractors—that, under the contracts, G & G is *not* entitled to such full payment. Pet. App. 25.

As Judge Kozinski points out in his dissenting opinion below, this dispute between the State, the general contractors, and G & G over the amount G & G is to be paid and the action of the State and the general contractors in withholding a portion of the payments otherwise due on the grounds that G & G has not fully complied with the prevailing wage provisions of its contracts "is no different from a builder's refusal to make progress payments when he discovers (or believes he has discovered) a failure of performance on any other term of a standard construction contract." Pet. App. 49. Indeed, "[w]ithholding payments under such circumstances is the standard remedy." *Id.* at 50.

The proposition that a person—like G & G—who has a *claim* on the withheld payment has a property interest in the immediate payment of the disputed amount cannot survive *Sullivan*. In that case this Court rejected a procedural due process challenge to a state statutory scheme for providing workers' compensation benefits and did so in terms that govern here.

Under the scheme in *Sullivan*, insurers are required to pay for medical treatment for eligible employees that is

"reasonable and necessary." Insurers may, however, withhold payment if the insurer disputes that a certain treatment is "reasonable and necessary," pending resolution of the dispute. *Sullivan* rejected the employees' contention that the withholding of a disputed payment is a deprivation of "property" within the meaning of the Due Process Clause. 526 U.S. at 60-61.

There was general agreement among members of the Court that the employees could not be regarded as having a property interest in the payments themselves *before* the dispute as to whether the treatment was "reasonable and necessary" had been resolved. 526 U.S. at 60 (majority opinion); *id.* at 62 (Ginsburg, J. concurring); *id.* at 63 (Breyer, J., concurring). *See also id.* at 63-65 (Stevens, J., concurring and dissenting). At the same time, *Sullivan* does not reach the separate question whether the employees "had a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the argument goes, could not finally reject their claims without affording them appropriate procedural protections. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982)." *Sullivan*, 526 U.S. at 61 n.13. *See also id.* at 62 (Ginsburg, J., concurring in the majority opinion on the understanding that it was not reaching the issue whether due process required fair procedures for the adjudication of worker's *claims* for benefits).

Under *Sullivan*, then, there is *no* "property interest in the payment of [amounts claimed to be due]," until the claimant has "clear[ed] [the] hurdles" necessary for the "property interest in the payment of [the claimed amount] to attach under state law." 526 U.S. at 60-61.

In this case, G & G does not dispute that the obligation to pay the prevailing wage was a material term of the subcontracts. Thus, the hurdle that G & G must clear for its asserted "property interest in the payment of [the full amount

provided in the contracts] to attach under state law" is a showing that the subcontractor met the condition in the subcontracts to pay prevailing wages. But G & G has not yet made any such showing and thus has not yet cleared that hurdle. Thus, the subcontractor does not have a "property interest" in the immediate payment of the contested amount, or a due process claim based on the State's refusal to make an immediate payment of that amount—any more than the *Sullivan* employees had a property interest in the withheld insurance payments at issue in that case so long as there was a dispute over whether their medical treatments were "reasonable and necessary." *See Sullivan*, 526 U.S. at 60-61.

B. When this case returned to the Ninth Circuit, following this Court's remand "for further consideration in light of . . . *Sullivan*," *Bradshaw*, 526 U.S. at 1061, the court of appeals shifted the locus of G & G's property interest in an attempt to bring its ruling for G & G into line with *Sullivan*. But the Ninth Circuit's second due process analysis is as unsound as its first.

With respect to the question "whether the claimant has a property interest in the matter complained of," the Ninth Circuit acknowledged that this Court "found that the *Sullivan* plaintiffs did not possess a property interest in the *immediate*, unconditional payment for all medical treatment under the Pennsylvania statute," while adding that the Court "went out of its way to make clear that its holding did not upset previous Supreme Court precedent supporting the conclusion that the plaintiffs had a property interest in their *claims* for payment." Pet. App. 4-5 (emphasis in original). In this regard, the court of appeals further observed that "Justice Ginsburg, who provided the fifth vote necessary to make the due process discussion in *Sullivan* an opinion of the Court, further clarified this distinction" between "a property interest in the *immediate*, unconditional payment" and "a property interest in the[] *claims* for payment." *Id.* (emphasis in original).

Having thus analyzed this Court's decision in *Sullivan*, the Ninth Circuit stated that it was "adopt[ing] the approach explicitly preserved by the *Sullivan* majority and unequivocally adopted in Justice Ginsburg's concurrence." Pet. App. 5-6. The court of appeals then concluded that "G & G's due process rights were violated, . . . not because it was denied immediate payment, but because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Id.* at 6.

In terms of this Court's precedents, the Ninth Circuit's due process analysis shifted from its pre-*Sullivan* reliance on cases such as *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg v. Kelly*, 397 U.S. 254 (1970)—where the issue was the temporary deprivation of funds in which the individual had a vested entitlement—to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)—where the issue was the complete destruction of a *legal claim*. *Compare* Pet. App. 29-30 (relying on *Goldberg* and *Sniadach*) *with id.* at 5 (relying on *Logan*).

The theory of *Logan v. Zimmerman Brush Co.*, is that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," 455 U.S. at 428, and that "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement," *id.* at 434. In *Logan*, the claim of a complainant under the Illinois Fair Employment Practices Act was "terminat[ed] . . . because of the [Illinois Fair Employment] Commission's failure to convene a timely conference" as required by the state statute. *Id.* at 426. The complainant's "property interest . . . [wa]s destroyed when [his] case [wa]s terminated," *id.* at 434 n. 8, because he could not "obtain judicial review of the Commission action," *id.* at 434, and was relegated by the state law to the "lengthy and speculative process" of a "tort suit" that would "never make the complainant entirely whole," *id.* at 437. *See Nevada v.*

United States, 463 U.S. 110, 144 n. 16 (1983)("*Logan* . . . was a suit where the complaining party would be left without recourse.").[2]

In the instant case, California law provides G & G ample "opportunity to present [its] claim of entitlement," *Logan*, 455 U.S. at 428, to the withheld contract payments at issue. That being so, the Ninth's Circuit's invocation of *Logan* to uphold G & G's due process claim is, completely misplaced.

As an initial matter, it is clear that California's statutory scheme contemplates that the State's decision to withhold payments is open to challenge. The Labor Code expressly provides for a suit "by the contractor or his or her assignee . . . to establish his or her right to the wages or penalties withheld." Cal. Labor Code § 1733. The reference in § 1733 to a suit by an "assignee" is an obvious reference to a suit by a subcontractor to establish its right to the withheld contract payments.

Thus, G & G could have requested assignments from the general contractors and filed a § 1733 lawsuit. So far as the record shows, G & G did not make any such request and offered nothing in the way of an explanation for its failure to do so. And, G & G could have secured an express *ex ante* contractual promise by the general contractor to make such an assignment. Again, the record is silent as to whether G & G sought or secured such an express promise and if not, why not.

The Ninth Circuit bypassed this point entirely by posing the purely hypothetical situation in which the State withholds

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[2] It is not altogether clear that a contract claim of the sort held by G & G constitutes a property interest for purposes of due process analysis. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986). We nonetheless proceed on the assumption that G & G's claims do constitute a property interest that cannot be extinguished without due process, and demonstrate in text, that G & G's claims for payments under its subcontracts have *not* been extinguished.

contract payments from a general contractor, the general contractor withholds payments from a subcontractor, and the general contractor then refuses the subcontractor's after-the-fact request for an assignment, thereby, as the court of appeals put it, leaving the subcontractor "holding a quite empty bag." Pet. App. 28. Contrary to the court of appeals' hypothesis, California law does not leave this hypothetical subcontractor without legal recourse.[3]

First of all, under California law there is in every contract "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bleecher v. Conte*, 29 Cal.3d 345, 698 P.2d 1154, 1156 (Cal. 1981); *California Lettuce Growers v. Union Sugar Co.*, 45 Cal.2d 474, 289 P.2d 785 (Cal. 1955). In the absence of an express *ex ante* contractual promise to provide an assignment, then, a general contractor could not arbitrarily refuse a subcontractor's request: "Where a contract confers on one party a discretionary power affecting the rights of another, *a duty is imposed* to exercise that discretion in good faith and in accordance with fair dealing." *Kendall v Ernest Pestana, Inc.*, 40 Cal.3d 488, 709 P.2d 837, 845 (Cal. 1985) (emphasis supplied).

Even on the attenuated and unwarranted assumption that a general contractor would breach that contract duty, well-established principles of California equity law would assure the subcontractor the right to bring its claim for withheld contract payments, as Judge Kozinski pointed out in dissent:

> If the contractor refuses to assign its right to sue for the money withheld to the subcontractor, the subcontractor

[3] The Ninth Circuit did *not* hold, in its pre-*Sullivan* opinion, that *no* state law remedies existed for its hypothetical subcontractor; the majority instead expressed "doubt" about the "viability" of such remedies. Pet. App. 36-37 n. 9. This state law issue was not revisited in the majority's post-*Sullivan* reinstatement order.

> could sue under the theory of equitable subrogation, which the California Supreme Court has held "is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Caito v. United California Bank*, 20 Cal.3d 694, 704 (1978) (quoting *Rhine v. Kemmerrer*, 114 Cal.App.2d 810, 814 (1952)) . [Pet. App. 50.]

See also United States v. California, 507 U.S. 746 (1993) (state imposed a tax on a federal contractor; contractor sought indemnification from the United States; having indemnified the contractor, the United States was, pursuant to California law, subrogated to the contractor's claims against the State for a refund).

Indeed, in *J & K Painting Co. v. Bradshaw*, 45 Cal.App.4th 1394, 53 Cal.Rptr.2d 496 (1996), the state court of appeal allowed a public works subcontractor challenging the calculation of the penalty amount figured into a withheld payment to proceed directly against the State by filing a petition for a writ of mandate.

The sum of the matter is that California, far from destroying a subcontractor's claim for withheld contract payments, provides the subcontractor an ample "opportunity to present [its] claim of entitlement." The salient point here is that G & G *never* took any action at all to make, much less perfect, its claim.

While the foregoing is more than sufficient to demonstrate that the Ninth Circuit's "empty bag" hypothetical rests on an erroneous account of present California law, we would be derelict if we failed to add that the California Legislature recently acted to add express language in the prevailing wage law stating that public works contractors and subcontractors each have an equal, independent—and legally proper—opportunity to present and perfect a claim for withheld

contract payments. An amendment to the prevailing wage law, operative on July 1, 2001, grants general contractors and subcontractors alike the right to a prompt administrative hearing to contest the State's withholding of contract payments and/or the amount of the wages and penalties withheld and the right to judicial review of the administrative determination. *See* Cal. Stats. 2000, ch. 954 (A.B. 1646), reprinted in West's California Legislative Service 5320-29 (2000). Upon a decision to withhold payment, the amended law requires the awarding body or the Labor Standards Division to serve written notice on the "contractor and the subcontractor" to "advise [them] of the procedure for obtaining review." Stats. 2000, ch. 954 §§ 9, 16.[4]

C. On the foregoing analysis of G & G's due process claim, the state action question that divided the Ninth Circuit—*viz.* whether the general contractors were engaged in "state action" when they withheld a portion of the contract payments from G & G—drops entirely out of the case. It is the State that is alleged to have destroyed G & G's legal claims for full contract payment and only the State that could conceivably do so. Action that destroys a legal claim is, by definition, "state action" for purposes of due process analysis. And, G & G's "destruction of a legal claim" due process theory fails not for a lack of "state action" but because the State has not, in fact, destroyed the claim.

To be sure, the state action question debated in the court of appeals was relevant under the analysis of the *first* Ninth Circuit decision here, which identified G & G's property interest as an interest in receiving *immediate payment* under

[4] This amendment to the California statute brings the State's procedures into line with the federal procedures. Where the federal government withholds payment from contractors who have failed to comply with the federal prevailing wage requirements, both general contractors and subcontractors have the right to an administrative hearing to establish their right to the withheld funds. *See* 29 C.F.R. §5.11.

the contract. This was so, because it was only the private party with which G & G contracted that was withholding payment from G & G. While we agree with Judge Kozinski that the decision of a private contractor to refuse to pay the disputed portion of an amount otherwise due under a contract with a private subcontractor generally does not constitute state action, we do not believe that this question survives the shift in analysis by the court of appeals majority.

CONCLUSION

The judgment of the courts below should be reversed.

Respectfully submitted,

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